TNEU SENG BEE & ORS

v.

LUMAYAN PLANTATION SDN BHD & ORS & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABDUL MALEK AHMAD JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NOS: W-02-5-1994 & W-02-27-1994]
13 NOVEMBER 1998

TRUSTS: *Trusts - Shares of company - Whether purchased from common family fund or personal fund - Whether shares subject to a trust*

COMPANY LAW: *Directors - Disclosure of interest in contract - Whether s. 131 of Companies Act 1965 contravened*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Whether judge erred - Whether finding ought to be disturbed*

The appellants herein had commenced two actions in the High Court. In Civil Suit No: D2-22-1547-1991 ('the first action'), the second plaintiff, Tneu Beh, was the elder brother to the second, third and fourth defendants. The rest of the plaintiffs in the first action were Tneu Beh's children. In Civil Suit No: D3-22-28-1992 ('the second action'), Tneu Beh was the sole plaintiff.

In both the actions, the plaintiffs claimed that all the shares in the companies, Lumayan Plantation Sdn Bhd and Tanjung Kelapa Sawit Sdn Bhd ('the companies'), held by the second, third and fourth defendants were held on trust for Tneu Beh as he had provided the purchase moneys for the said shares. The plaintiffs further claimed that Tneu Beh had been wrongfully removed as director of the companies by the defendants. Contrary to this, the defendants claimed that the properties listed in the Schedules of their counterclaims were family assets purchased from a common family fund and should be distributed equally between Tneu Beh, the second, third and fourth defendants. The High Court dismissed the plaintiffs' claims and allowed the defendants' counterclaims ordering that the properties listed in the Schedules of their counterclaims together with other specified properties be distributed equally between Tneu Beh, the second, third and fourth defendants. The plaintiffs appealed against this decision and the defendants cross-appealed.

Held:

Per Abdul Malek Ahmad JCA

[1] The learned judge had analysed the evidence correctly and had made the proper inferences from the facts before her. Her conclusions tallied with the overall effect of the testimony recorded and the instant court should not interfere with her findings.

Per Ahmad Fairuz JCA

[1] On the purchase moneys, the learned judge had traced the history of the moneys and found that considering the relationship of the parties, the close family unit and that their lives were centred on the success of their family businesses and family life, there was ample evidence of the existence of a family fund and that it was this family fund that financed the purchases of the numerous assets and properties the ownership of which were being disputed.

[2] On the plaintiffs' contention that the transfer of 210,000 shares in the companies from the fourth defendant to the second defendant was defective for being in contravention of s. 131 of the Companies Act 1965, the learned judge had rightly found that s. 131 had not been contravened as all the directors were aware of the fourth defendant's interest when they executed the resolution approving the transfer of the shares.

[3] As to Tneu Beh's claim that he was wrongfully removed as a director of the companies, the learned judge had correctly held that the defendants had exercised their rights as majority shareholders when they removed him.

[4] Assuming that there was a trust created in favour of Tneu Beh, this court should not give effect to and should not enforce the trust. This was because Tneu Beh had admitted to transferring the shares in his brothers' names to avoid paying tax. The trust which Tneu Beh contended existed would have been tainted with illegality and therefore would have been unenforceable. In fact, there was clearly the existence of an implied trust in favour of the family.

[5] On the defendants' counterclaims, the judgment of the learned judge showed that she based her decision on the same findings of fact when she directed that the properties in the Schedules in the counterclaims be distributed equally. Thus, the learned judge's conclusion in allowing the counterclaims should also not be disturbed.

[6] As to the cross-appeals, the learned judge had considered the relevant documents before she concluded that the second defendant was entitled to be reimbursed for the advances he had made to the families.

[Appeals and cross-appeals dismissed with costs.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Appeal [1995] 3 CLJ 639 ***(foll)***

Clarke v. Edinburgh Tramways Co [1919] SC 35 ***(foll)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung [1997] 3 CLJ 189 ***(foll)***

In re Howes-Howes v. Platt TLR Vol XXI [1904-1905] 501 ***(refd)***

Pettitt v. Pettitt [1970] AC 777 ***(refd)***

Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(foll)***

Yew Phaik Hoon v. Quah Ooi Keat & Anor [1969] 1 MLJ 32 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 131, 132C(1)(b), 132E

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 42, p 196

Lewin on Trusts, WJ Mowbray, 16th edn, p 6

[Appeal from High Court, Kuala Lumpur; Civil Suits Nos: D2-22-1547-1991 & D3-22-28-1992; [1995] 1 CLJ 741]

For the appellants - KS Narayanan (Colin Pereira, Anthony Leong & Saranjit Singh with him); M/s Riza Leong & Partners

For the 1st & 2nd respondents - Robert Lazar (CW Lam with him); M/s Shearn Delamore & Co

For the 3rd & 4th respondents - DP Naban (KA Gan with him); M/s Hishamuddin Loong

Reported by Cindy Chan

JUDGMENT

NH Chan JCA:

I have had the advantage of reading the judgments in draft of my lords Abdul Malek Ahmad and Ahmad Fairuz Sheikh Abdul Halim JJCA and I also agree that both appeals and the cross appeals be dismissed with costs.

Abdul Malek Ahmad JCA:

Despite the number of names in the headings of these two appeals, the principal characters are actually only Tneu Beh and his three brothers Tiew Kun @ Tiew Boon Eu (hereinafter "Boon Eu"), Tew Hon Liam @ Tiew Boon Beng (hereinafter "Boon Beng") and Tew Tian Lam @ Tneu Boon Seng

(hereinafter "Boon Seng") against who he with three others had sued in relation to the shares of Lumayan Plantation Sdn. Bhd. (hereinafter "Lumayan") in Kuala Lumpur High Court Civil Suit No. D2-22-1547-1991 and by himself regarding the shares in Tanjung Kelapa Sawit Sdn. Bhd. (hereinafter "Tanjung") in Kuala Lumpur High Court Civil Suit D3-22-28-1992.

The four brothers are the sons of Tew Cheng Kang (hereinafter "Cheng Kang") who passed away in 1967 and Goh Tian who died in 1979. Cheng Kang took Goh Tian, Boon Eu, Boon Beng, Boon Seng and a daughter in 1946 to China leaving 12 year old Tneu Beh behind with Cheng Kang's younger brother Tiew Kok. Two years later, Cheng Kang returned with a nephew Teck Lam to join Tiew Kok in the coffee and coconut business in Tanjung Sepat, Ulu Langat. Tneu Beh was employed by them.

Goh Tian returned from China in 1955 with Boon Eu, Boon Beng and Boon Seng. Boon Beng and Boon Seng stopped schooling to join the family business while Boon Eu did not and later qualified as a civil engineer in Taiwan. That same year Tneu Beh got married. The following year saw the end of the coffee and coconut business of Cheng Kang, Tiew Kok and Teck Lam and the start of the saga involving the four brothers.

The learned trial judge had quite systematically marshalled the facts by dividing the sequence of events into three time periods, namely from 1956 to 1967, from 1968 to 1979 and from 1980 to 1991.

The first period from 1956 to 1967 begins from the year the joint business of Cheng Wang, Tiew Kok and Teck Lam split up to the year Cheng Kang died. It was during this period that the properties listed in Schedule A to the counterclaims were acquired and registered in Tneu Beh's name except for the land in Batu.

Tneu Beh maintains that all the lands registered either in his name or in the names of his immediate family members and his younger brothers are his as in the case of his immediate family members they had been purchased from out of his own funds and as regards his younger brothers, they had only held the lands in trust for him. Pertaining to the Tanjung to the Lumayan shares registered in his brothers' names, Tneu Beh had sought a declaration that they held them as his nominees and the shares should be transferred to him as the beneficial owner.

Quite naturally Boon Eu, Boon Beng and Boon Seng do not agree with Tneu Beh's contention and insist that although the lands and shares are registered in their names and in the name of Tneu Beh and his immediate family members, all of them held them as trustees for the family, and by virtue of

the fact that the lands and the shares were acquired from a family fund, they should be equally distributed between the four brothers. In addition, Boon Eu claims a reimbursement of all monies he had lent to the family upon his graduation.

It is pertinent to consider the testimony of Teck Lam who joined Cheng Kang and Tiew Kok in the joint business in 1948 when he came to this country. He said that following the split, the 25 acres of land were divided between three of them to the exclusion of Tneu Beh. Cheng Kang got 10 acres, Tiew Kok 12½ acres and Teck Lam 2½ acres. It was also Teck Lam's evidence that Cheng Kang was very active throughout, managing the family business and finances together with Tneu Beh, Boon Beng and Boon Seng except for the last two years prior to his death when he became sickly contrary to the testimony of Tneu Beh who said that the land was divided only between Teck Lam and him while his father Cheng Kang got nothing as he could not assist in the business being plagued with ill health all along.

The learned trial judge relied heavily on Teck Lam's version as she was of the view that he had nothing to gain from the claims and counterclaims. In consequence, she had her doubts on Tneu Beh's evidence as to how the shares were divided following the split. As for the setting up of Chop Eng Kwang which was formed after the split and dissolved in 1984 and which was dealing in coffee, coconuts, vegetables and fruits, despite being started in 1956, it was only registered on 20 May 1960 with Tneu Beh as the sole proprietor.

It was the finding of the learned trial judge that this did not entitle Tneu Beh to regard the business as his personal business as Cheng Kang was still alive and would be in control being the head of the family. Furthermore, Boon Beng and Boon Seng assisted in the business but were not paid salaries as their living expenses came from it. It is also not disputed that Boon Seng took over the sole proprietorship from Tneu Beh on 1 August 1972.

The other business was Sin Ho Seng which dealt in rubber. Tneu Beh maintained that he became a partner in 1963 with one Ng Soon Bee on his initial capital of RM5,000. Ng Soon Bee retired in 1964. Tneu Beh became the sole proprietor until 1977 when Sin Ho Seng became a limited company with him and Boon Seng holding 40 per cent of the shares each and one Lim Kwee Chan holding the remaining 20 per cent. Boon Beng, however, disputes Tneu Beh's testimony as regards the RM5,000 as he maintains that the money was given by Cheng Kang who left the management of the business to Tneu Beh, Boon Seng and to him.

At first, Cheng Kang and his family lived with Teck Lam but he and his four sons moved to No. 376 Main Road, Tanjung Sepat in 1963. This house was a four unit shophouse which Tneu Beh claims belongs to him as he had bought the land on which the shophouse stands. Boon Eu, however, gave evidence that Cheng Kang constructed the shophouse but transferred the title of the land to Tneu Beh.

The learned trial judge preferred Boon Eu's testimony on this issue as the four entrances to the shophouse strongly indicated Cheng Kang's concern that his four sons and their families should live together under one roof. Moreover, Tneu Beh had only made a bare assertion with no specific particulars as to when the purchase was made, who the vendor was and what the actual purchase price was.

In 1974, another business was set up by Tneu Beh, Boon Beng and two others which was called Sin Ho Seng Kelapa Sawit dealing, naturally, with palm oil. This was dissolved the following year and converted to Tanjung with a capital of RM5 with five equal shareholders namely Boon Eu, Boon Beng, Boon Seng, Tiew Eng and Lim Hai Cheng.

We move now to the second period between 1968 to 1979. 1968 was the year following the year Cheng Kang died and 1979 was the year Goh Tian passed away. When Cheng Kang died, Tneu Beh obtained letters of administration in respect of his estate. Tneu Beh transferred to himself the only property which was house Lot B. He identified only three beneficiaries namely himself, his mother and Boon Seng, explaining that it was his mother's idea to exclude Boon Eu and Boon Beng as they did not speak the National Language. However, he is now agreeable to include them for the purpose of dividing the property.

For the third period between 1980 and 1991, Boon Eu had qualified as a civil engineer and was working in Singapore with a high income. Only after that did he take an interest in the family business especially after Tneu Beh spent more time in Thailand having taken a second wife there and having started Bangkok Oil and Fats Co. Ltd. It was then that Boon Eu looked after Tneu Beh's first family and Boon Beng's and Boon Seng's families advancing his own funds for their educational needs both at home and abroad.

In 1986, there was an attempt to distribute the family assets after paying Boon Eu for all his advances but this did not materialise. In 1991, Tneu Beh got five persons who were not family members to mediate in the distribution issue but this resulted in disagreement. It is pertinent to note that Tneu Beh denied the earlier family attempts but this contradicts his later attempts with the outsiders.

As regards Tanjung, Lim Hai Cheng transferred his share to Tneu Beh pursuant to an agreement dated 1 September 1978 who apart from being director also became chairman. The original capital of RM5 was increased to RM140,005 in 1980 with Tiew Eng owning 20 per cent and Tneu Beh, Boon Eu, Boon Beng and Boon Seng 30 per cent each. The position was changed on 1 May 1981 when Tiew Eng transferred, in exchange for a piece of land, his 20,001 shares to Tneu Beh making him the major shareholder with 50,002 shares.

The shareholding position changed further on 12 August 1981 when Boon Eu, Boon Beng and Boon Seng were allotted 31,999 shares each while Tneu Beh got 63,998 shares making him owner of 114,000 shares representing 38 per cent of the paid up capital. Accordingly, the shareholding of each of his three younger brothers was 62,000 shares but with their combined 61.8 per cent shareholding of 186,000 shares, they removed Tneu Beh as chairman and director of Tanjung on 7 March 1991.

Tneu Beh's explanation was that it was he who provided the initial capital but had the shares registered in his brothers' names on trust for him as beneficial owner to avoid paying income tax. This explanation alone makes the claim unenforceable as the reason is illegal. The learned trial judge, however, did not accept this contention as Tanjung originated from Sin Ho Seng Kelapa Sawit and not from Tneu Beh. Apart from that, there was no other indication that Tneu Beh was actually paying high income tax at that relevant time. In fact, he had only joined Tanjung much later. There was also the evidence that there was this iron safe where all the family cash profits were kept.

On this point, the learned trial judge said at pp. 22 and 22 of her judgment as follows:

> It is this collective contributions of the 4 brothers that have earned the family the wealth, the distribution of which is now disputed. They are no doubt partners insofar as the family businesses are concerned. They were not concerned with whom the properties were registered as there is no bickering amongst them until these proceedings commenced.
>
> Considering all the evidence in its entirety, it is my considered opinion that an implied trust exists on the facts of this case and that the registered owners of the various properties hold them in trust for the family.

Lumayan was incorporated on 14 December 1970. On 29 January 1978, Tneu Beh purchased 350,000 shares from six different shareholders of Lumayan for RM906,400 with him providing 49 per cent of the purchase price and the remaining 51 per cent provided by ten friends of his. None of the shares were registered in his name but in the names of his three brothers and Tanjung.

One of Tneu Beh's ten partners, Gan Yong Chai sold his 16,000 shares in Lumayan to Boon Seng but Tneu Beh insisted that he paid for them on behalf of Boon Seng. Following this sale, Boon Eu, Boon Beng, Boon Seng and Tanjung held 51 per cent of the shares while the remaining nine friends of Tneu Beh held 49 per cent. However, all the 49 per cent was transferred to Tneu Beh and his three sons in 1982.

Tneu Beh claims that Boon Eu's 52,000 shares, Boon Beng's 40,000 shares and Boon Seng's 56,000 shares in Lumayan are held by them as his nominees and demands a transfer to him of those shares as beneficial owner pursuant to cl. 3 of the sale and purchase agreement which had made reference to the purchaser "or his nominees."

The learned trial judge said that she would have readily inferred that the shares claimed by Tneu Beh was covered by the implied trust in the absence of cl. 3. However, she pointed out the fact that the sale and purchase agreement was actually between Tneu Beh and his nine friends whereas Boon Eu, Boon Beng and Boon Seng were not even aware of the agreement. As such, she held that the implied trust overrides cl. 3 of the sale and purchase agreement. She even held that since the evidence is scanty as regards the shares procured by Tneu Beh from his friends with properties owned by him, she was of the view that the purchase of the 49 per cent must have come from the family fund.

On 28 September 1984, all the four brothers passed a resolution as directors of Tanjung approving the sale of 210,000 shares held by Tanjung in Lumayan at RM1.50 each. In another agreement four day earlier, Boon Seng had agreed to purchase the said shares. Boon Seng tendered a cheque of RM58,815.45 in August 1991 after deducting RM256,184.55 which was the amount owed to him by Tanjung. At the same time, Lumayan passed a resolution approving the transfer of the 210,000 shares from Boon Seng to Boon Eu.

Tneu Beh now makes a claim for those shares on the grounds it was improperly transferred. His contention was that the shares should revert to Tanjung and then to him by virtue of cl. 3 of the sale and purchase agreement.

It was also his contention that the transfer did not comply with s. 131 of the Companies Act 1965 (hereinafter "the Act") which deals with the disclosure by a director of his interests in any contract with the company. He maintains that Boon Seng did not disclose his interest in Tanjung when he signed the sale and purchase agreement. The learned trial judge held the said section had not been contravened as all the directors, namely all the four brothers, were aware of Boon Seng's interest at the relevant time.

Further, the purpose of the sale was to pay off Tanjung's debts to Chop Eng Kwang whose sole proprietor was Boon Seng. That was why in August 1991 Boon Seng only paid the difference between the sale price and the amount owed to him by Tanjung.

Tneu Beh also insists that the sale was not approved at an annual general meeting and Boon Seng had not complied with s. 132C(1)(b) and 132E of the Act. Section 132C(1)(b) of the Act, which came into force on 1 February 1986 *vide* Act A616 and subsequently amended by Act A657 which came into force one year later, states that the directors shall not carry into effect any proposal or execute any transaction for the disposal of a substantive portion of the company's undertaking or property which would materially and adversely affect the performance or financial position of the company unless the proposition or transaction has been approved by the company in general meeting. Section 132E of the Act, which came into force on 1 February 1987 *vide* Act A657 and subsequently amended by Act A836 which came into force on 10 September 1992, provides that all substantial property transactions involving directors must be approved by a resolution at the company's general meeting. The learned trial judge found this objection devoid of merit as Tneu Beh had agreed to this sale and in any case both the sections questioned were not then in force as the sale and purchase agreement was entered into on 29 January 1978.

As for Boon Eu's claims, despite the absence of any account books, the learned trial judge, after carefully considering his testimony before her, was satisfied that Boon Eu was entitled to claim the RM912,870.45 being the difference between the amount he had expended and the amount he had taken from the family fund.

Having evaluated the evidence, the learned trial judge finally made the following orders:

(a) that the claims be dismissed with costs;

(b) that the counterclaims be allowed with costs and that all the properties listed in Schedules A, B and C therein be distributed equally between Tneu Beh, Boon Eu, Boon Beng and Boon Seng. These properties include:

(i) house Lot B that has been registered in Tneu Beh's name as the sole beneficiary of Cheng Kang's estate;

(ii) other properties, or their value, that had been sold by Boon Eu, Boon Beng and Boon Seng;

(iii) all the Tanjung and Lumayan shares, including those registered in the names of Tneu Beh and members of his immediate family;

(iv) the 210,000 Lumayan shares registered in Tanjung's name; and

(c) that RM912,870.45 be paid out to the family property to Boon Eu before the distribution is effected as in para. (b) above.

The learned trial judge had analysed, quite admirably I must add, the evidence correctly and had made the proper inferences on the facts before her. Her conclusions, to my mind, tallied with the overall effect of the testimony recorded and sitting as an appellate tribunal, I do not think it is our function to interfere with the learned trial judge's findings. Accordingly, we dismissed both the appeals with costs. As for the cross appeals, we saw no reason to vary the learned trial judge's orders as prayed for in the counterclaims. They were also dismissed with costs. The deposits for the appeals are to go to the respondents to account of their taxed costs.

At the time of delivery of the judgment and in view of our decision, we invited all counsel to give their views on the question of costs. Learned counsel for the appellants argued that each party ought to bear their own costs as both the appeals and the cross appeals had been dismissed. Learned counsel for the third and fourth respondents felt that the appeals should be dismissed with half costs whereas for the cross appeals there should be no order as to costs. We were, however, more inclined to agree with learned counsel for the first and second respondents that costs should be awarded the way we ordered as costs should follow the event and it did not mean that the costs would be the same for both the appeals and the cross appeals as it was up to the taxing registrar to assess. Accordingly, we confirmed our order that the two appeals and the cross appeals are dismissed with costs.

Ahmad Fairuz JCA:

These are appeals and cross-appeals against a judgment of the High Court Kuala Lumpur dismissing the second appellant's claims and allowing the respondents' counterclaims. The High Court also ordered that the properties listed in Schedules 'A', 'B' and 'C' in the counterclaims together with certain other specified properties be distributed equally between the second appellant, the second, third and fourth respondents. It was further ordered that a sum of RM912.870.45 be paid out of the family property to the second respondent before effecting the distribution.

The appellants had commenced in the High Court Kuala Lumpur two actions against the respondents. The second appellant is the elder brother to the second, third and fourth respondents. The other appellants in the first action (High Court Kuala Lumpur Civil Suit No. D2-22-1547-1991) are the second appellant's children. Only the second appellant sued the respondents in the second action (High Court Kuala Lumpur Civil Suit No. D3-22-28-1992).

In both actions the appellants claim that all the shareholdings of the second, third and fourth respondents in the first respondent companies are held on trust for the second appellant as he (the second appellant) had provided the purchase monies for them. The second appellant also claims that he had been wrongfully removed as directors of the first respondent companies and seeks several consequential orders.

The respondents, on the other hand, claim that the properties in Schedules 'A', 'B' and 'C' of their counterclaims are family assets out of a common fund of the family and as such, the properties are to be distributed equally between the second appellant and the second, third and fourth respondents. The respondents also seek several consequential orders as detailed in their counterclaims.

The Appeals

In his submission before this court, the learned counsel for the appellants emphasised that the appellants' claims are only on the shares in the first respondent companies. The appellants contended that those shares belong to them although they were in the respondents' names. According to the appellants, the respondents held those shares in trust for them. In support of this contention, the appellants' counsel referred to cl. 3 of the sale and purchase agreement between the second appellants and the vendors of the shares of the first respondent company (in the first action), ie, Lumayan Plantation Sdn. Bhd. (Lumayan). Clause 3 reads:

> 3. Completion of the sale and purchase of the said shares shall take place on the 28th day of February 1978 (hereinafter referred to as "the said completion date") when against delivery to the purchaser or his solicitors of deeds of transfer duly executed by the respective Vendors in favour of the Purchaser or his nominees in respect of the whole of the said shares accompanied by the share certificates relating thereto together with resignation of directors and other officers in the form of the drafts already prepared and initialled for the purposes of identification the Purchaser shall pay to each of the Vendors or their solicitors the amount of the consideration set out opposite his/her or its respective name in the fourth column of the First Schedule hereto.

The appellants' counsel laid emphasis on the words "... purchaser or his nominee ..." appearing therein. In this connection the counsel adverted to *Lewin on Trusts* (16th edn) by W.J. Mowbray wherein at p. 6 the author said: "A bare or simple trustee, especially of shares in a limited company, is often called a nominee. He is a mere name or "dummy" for the true owner." The counsel then pointed out that the second appellant had in his evidence said, in reference to the purchase of the Lumayan shares, "... I settled the purchase price in full. Part of the purchase price came from others whilst the other part

was my own money ..." Because the second appellant had provided the purchase monies – including for the purchase of Tanjong Kelapa Sawit Sdn. Bhd.'s shares (the first respondent company in the second action) – the shares in the names of respondents were therefore held in trust for the second appellant. In support of this contention, the counsel referred to several authorities including that at the footnote 1 of p. 196 in *Halsbury's Laws of England* (4th Edn – Vol. 42) which reads:

> If the purchaser provides the money on his own account, and not by way of loan to the nominee, and the nominee is a stranger, there is *prima facie* a resulting trust to the purchaser: see *Dyer v. Dyer* [1788] 2 Cox Eq Cas 92 at 93; *Lynch v. Clarkin* [1900] 1 IR 178 (Ir. CA); GIFTS, Vol. 20. paras. 39 *et seq.*; TRUSTS.

The learned counsel for the respondents however, drew the attention of this court to the evidence which show that the purchase monies used by the second appellant were not the second appellant's monies but were monies belonging to the families of the second appellant, the second, third and fourth respondents and their father (the family).

On this issue of the purchase monies, the learned High Court judge has, in her judgment, traced the history of those monies. It was the learned judge's finding that the second appellant's and the second, third and fourth respondents' father returned from China in 1948. In the same year the father joined Teck Lam (DW2) and Tiew Kok in the business of trading and processing coffee and coconut in Tanjong Sepat, Ulu Langat. The second appellant worked for them. In 1956 the joint business of the father, Tiew Kok and Teck Lam was split up and this, according to the learned judge, "saw the beginning of the father, Tneu Beh, Boon Beng and Boon Seng initially and later on Boon Eu, accumulating assets through the formation of family businesses and that the income and profits derived from such businesses were channelled towards purchasing landed properties and shares which now form the subject matter of the dispute amongst the four brothers". (Tneu Beh, Boon Beng, Boon Seng and Boon Eu are respectively the second appellant, the third respondent, the fourth respondent and the second respondent.) The learned judge further pointed out that the father and members of his immediate family lived together with Teck Lam at the beginning. In 1963, they moved to a 4-unit shophouse situated at No. 376, Main Road, Tanjong Sepat, and until 1990, the families of the second appellant and the second, third and fourth respondents "lived as one family unit, cooking and eating from the same pots". Moving on to the Tanjong Kelapa Sawit Sdn. Bhd. (the first respondent company in the second action), the learned judge said: "... 1974 also saw the formation of another business concern under the style and name of Sin Ho Seng Kelapa Sawit and from its very name, it dealt in palm oil. It was a partnership firm and the partners were Tneu Beh, Boon Beng and two others.

This partnership was dissolved in 1975 when it was converted into a company known as Tanjong Kelapa Sawit Sdn. Bhd. (Tanjong), and the assets of the partnership went to Tanjong.

The capital of Tanjong was then RM5, divided into five shares of RM1 each, and the original shareholders were:

(1) Boon Beng

(2) Boon Seng

(3) Boon Eu

(4) Tiew Eng

(5) Lim Hai Cheng

Boon Beng, Boon Seng and Boon Eu were also the original directors of Tanjong but Tneu Beh was neither a shareholder nor a director then ..." The learned judge found that the second appellant became a shareholder and chairman of Tanjong in 1978. His shareholdings increased substantially following two capitalisation exercises. "This" said the learned judge, "do not support the reason why he had excluded himself initially from participating in the business of Tanjong. If indeed the three younger brothers were his trustees as Tneu Beh would like this court to believe, there is no reason why he should join Tanjong as a shareholder and director later. The fact that he did can only mean that Tanjong, like the other businesses run by the family, is no more different in that it is also another family business and in 1978 when he became a shareholder, a director and chairman of Tanjong, he was already the head of the family by virtue of his being the eldest son of the family and he had to assert his position by getting himself involved in a company which he had founded. For these reasons, I do not consider that the shares now held by Boon Beng, Boon Seng and Boon Eu in Tanjong are held by them as trustees for Tneu Beh". Further on in her judgment the learned judge asked: "As Tanjong's capital came from Sin Ho Seng Kelapa Sawit, where did the funds originate to establish that partnership firm and, for that matter, the other family businesses?". To this question the learned judge answered: "In this respect there is evidence to show that there was an iron safe which Tneu Beh admitted was purchased by him and kept in his parents' room. Although Tneu Beh was not asked why he purchased the iron safe, there is evidence from his three younger brothers that cash profits earned from the family businesses were pooled into the iron safe and it was the money from the iron safe that financed the purchases of the family's investments. While it is true that there is no direct evidence as to the amount of money that was kept in the iron safe, and the amount taken out, the practice of maintaining

such a safe for such a purpose is not altogether strange, given the situation that what we are dealing here is a typical Chinese family, steeped in the tradition that they work and live together and during the lifetime of the father, the son looked to him as the head of the family and after his death, the mother took his place and after her death, the honour fell on the shoulders of the eldest son, Tneu Beh. Considering the relationship of the parties, the close family unit and that their lives are centred on the success of their family businesses and family life, I consider that there is ample evidence of the existence of a family fund and that it was this family fund that financed the purchases of the numerous assets and properties, the ownership of which is now being disputed."

As regards the appellants' claim on the 210,000 shares of the Tanjong Kelapa Sawit Sdn. Bhd. in Lumayan Plantations Sdn. Bhd., (the first respondent in the first action), the learned High Court judge said: "Tanjong also holds shares in Lumayan and initially the number was 105,000 shares but following a capitalisation exercise, Tanjong's holdings rose to 210,000 in 1978. However, on 28 September 1984, the four brothers, in the capacities as directors of Tanjong, passed a resolution approving the sale of the 210,000 shares held by Tanjong in Lumayan at the book value of RM1.50 ..." The learned judge then found that on 24 September 1985, an agreement (D4) was signed between Tanjong and Boon Seng (the fourth respondent), whereby the fourth respondent agreed to purchase the 210,000 shares for a consideration of RM315,000. This sale was only completed in August 1991 when the fourth respondent tendered a cheque for RM58,815.45 after credit was given for the debt due from Tanjong to the family business of Chop Eng Kwang. The fourth respondent was then the sole proprietor of Chop Eng Kwang which started doing business in 1956. Chop Eng Kwang however was only registered on 20 May 1960 and the second appellant was the registered sole proprietor. The third and fourth respondents, however, assisted the second appellant in the business. They were not paid salaries but their living expenses were taken care of by the business. On 1 August 1972 the fourth respondent became the sole proprietor of Chop Eng Kwang. In this connection the learned judge also found that Tanjong's debt to Chop Eng Kwang amounted to RM256,184.55 as at 31 December 1990. Subtracting this sum from the purchase price of the 210,000 shares under D4 accounted for the sum specified in the cheque tendered by the fourth respondent to Tanjong in August 1991. It was also pointed out by the learned judge that Lumayan had, at about the same time, passed a resolution approving the transfer of the 210,000 shares from the fourth respondent to the second respondent.

In her judgment the learned judge considered the second appellant's contention that the transfer of those shares is defective as s. 131 of the Companies Act 1965 (the Act) has been contravened. Section 131 deals with the disclosure

by a director of any interests the director has in any contract with the company. On this contention the learned judge opined: "The duty to disclose under the s. 131 of the Act is to make all the directors aware of the interests which one or more directors may have in a contract entered into with the company. Under the circumstances of this case, I do not consider that s. 131 has been contravened as all the directors were aware of Boon Seng's interest when they executed D3." D3 is the resolution passed by the second appellant and the second, third and fourth respondents on 28 September 1984 (referred to above). Having held that s. 131 had not been contravened and having accepted the respondents' evidence on the transfer of the 210,000 shares of Tanjong Kelapa Sawit Sdn. Bhd. in Lumayan Plantations Sdn. Bhd, the learned judge said: "... considering my finding on there being an implied trust in this case, ... the 210,000 shares now formed part and parcel of the family property".

It was contended that the abovementioned findings of the learned judge are not supported by evidence. I had therefore meticulously examined the evidence tendered before the High Court judge and I found that the evidence do support the learned judge's abovementioned findings. As such I am not prepared to disturb the findings. For this, I am guided by the case of *Yew Phaik Hoon v. Quah Ooi Keat & Anor* [1969] 1 MLJ 32, in which the Privy Council refused to disturb the finding of fact made by the learned trial judge. In that case the learned trial judge found as a fact that the estate was held by Y.H.E. in trust for the plaintiff. The Privy Council held that that finding could not be disturbed unless supporting evidence was lacking.

It is also clear from the learned judge's judgment that the conclusions she made were all based on the findings of fact by her. In fact, a close scrutiny of the second appellant's evidence reveals and strengthens further the correctness of the learned judge's conclusions. In his evidence under cross-examination, the second appellant agreed that:

(1) the respondents' families live with his (the second appellant's) families in the same house.

(2) in 1955 the second appellant got married to a woman "he was unhappy with". This did not force the second appellant "to withdraw from the family's business activities". The money generated from the business was kept in a box in the house.

(3) the partnership in Sin Ho Seng Kelapa Sawit was converted into a company known as Tanjong Kelapa Sawit Sdn. Bhd. and all the assets of the partnership went to Tanjong Kelapa Sawit Sdn. Bhd.

(4) Tanjong Kelapa Sawit Sdn. Bhd. owed money to Chop Eng Kwang.

These evidence of the second appellant strengthen the inherent credibilities and probabilities of the respondents' version that the monies for the purchase of the shares of the Tanjong Kelapa Sawit Sdn. Bhd. came from the family's common fund and not from the second appellant.

As to the claim of the second appellant that he was wrongfully removed as directors of the first respondent companies in both actions, the learned judge held that the respondents had exercised their rights as majority shareholders when they removed the second appellant. Again I am unable to disagree with the learned judge as the evidence do support the learned judge's finding.

Assuming that there was a trust created in favour of the second appellant, I am of the view that this court should not give effect to and should not enforce the trust in the second appellant's favour. This is because in his evidence the second appellant distinctly said. "I put the shares in my brothers' names as I wanted to avoid paying income tax". On the strength of the case of *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170 which was followed by this court in *Aik Ming (M) Sdn. Bhd. & Ors v. Chang Ching Chuen & Ors & Another Appeal* [1995] 3 CLJ 639; [1995] 2 MLJ 770, the trust, which the second appellant contended existed, is plainly tainted with illegality and therefore is unenforceable. Surely avoiding paying income tax cannot be legal.

For the reasons stated above, I am of the view that the dismissal of the claims of the appellants is proper and justified. In fact the above-mentioned excerpts from the judgment of the learned judge show clearly the existence of an implied trust in favour of the family. Cases like *Pettitt v. Pettitt* [1970] AC 777 and *In re; Howes-Howes v. Platt* TLR VoL XXI [1904-1905] 501 do support the propriety of this conclusion of the learned judge. The aforesaid excerpts also show that the learned judge's reasonings are impeccable.

As regards the respondents' counterclaims, the judgment of the learned High Court judge shows clearly that the learned judge had based her decision on the same findings of fact highlighted above. Because of those findings of fact, the learned judge directed that the properties in Schedules 'A', 'B' and 'C' in the counterclaims be distributed equally between the second, third and fourth respondents and the second appellant. For the reasons mentioned earlier on as to why the learned judge's findings of fact should not be disturbed, the learned judge's conclusion in allowing the counterclaims should not accordingly be disturbed too.

Cross-appeals

As to the cross-appeal of the first and second respondent, I find that the learned High Court judge had considered the relevant documents before she concluded that the second respondent was entitled to be reimbursed for the

advances he had made to the families of the second appellant and the third and fourth respondents. The sum of RM912,870.45 ordered to be paid to the second respondent from the family property is the correct amount and is supported by evidence. The second respondent himself admitted under cross-examination that he took RM374,722.37 from the family fund. As such this sum had to be subtracted from the sum of RM1,287,592.82 advanced by the second respondent to the families of the second appellant, the third and fourth respondents. Consequently prayers 1(a) and (b) of the cross-appeal ought to be dismissed. Prayer 1(c) of the cross-appeal of the first and second respondents and prayer 1(a) of the cross-appeal of the third and fourth respondents ought to be dismissed as the subject matter therein never appeared in their counterclaims. Prayers 1(d) to (i) of the cross-appeal of the first and second respondents and prayers 1(b) to (g) of the cross-appeal of the third and fourth respondents too ought to be dismissed as these prayers are in their counterclaims and the learned High Court judge had allowed them.

Conclusion

These appeals and cross-appeals, in my view, revolve around findings of fact by the learned judge. In this connection Lord Shaw in *Clarke v. Edinburgh Tramways Co.* [1919] SC (HL) 35 at 36 said:

> In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

On this excerpt, Gopal Sri Ram JCA, in *Commercial Union Assurance (M) Sdn. Bhd. v. Ng Chek Hung* [1997] 2 MLJ 465 at 470 said: "I must confess my own inability to locate a clearer statement reflecting the duty of an appellate court in a case where findings of fact are asked to be reviewed." Having asked myself the same question asked by Lord Shaw to himself, I am not satisfied in my own mind that the learned High Court judge was plainly wrong. Consequently the appeals and cross-appeals are hereby dismissed with costs.